

February 2012 - Vermont Bar Examination Essay Questions

QUESTION 1 - February 2012

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) and will be available at www.ncbex.org at a later date.

QUESTION 2 – February 2012

PLEASE NOTE: QUESTION 2 was a "Multistate Performance Test" (MPT) and will be available at www.ncbex.org at a later date..

QUESTION 3 – February 2012

Florco is a manufacturer of sport flooring products with its principal place of business in Los Angeles, California. AmSport sells and installs flooring products for sport centers, and has its principal place of business in Queen City, Vermont. The parties have been doing business together for over twenty years. In November 2009, AmSport sent an email to Florco requesting delivery of flooring products totaling \$100,000. Florco shipped the products to AmSport in Vermont along with a corresponding Invoice in the amount of \$100,000 in January 2010 the ("Shipment"). AmSport did not return any portion of the Shipment to Florco.

Like all of Florco's invoices, the reverse of the Invoice contains the following provisions:

- The total amount invoiced is payable 90 days net, without discount, at the end of the month in which the invoice is issued. Interest shall accrue on any unpaid amount at 18%.
- By explicit agreement, if any means other than friendly reminders should prove necessary to recover any amount owed, then the amount due will increase by 10%, exclusive of interest, plus any legal fees that we may incur.
- The following Limited Warranty shall be the sole and exclusive warranty pertaining to the Florco products shipped herewith. The Florco products shipped herewith shall be free from manufacturing defects for a period of two (2) years from the date of sale, provided such products are subject to normal use and receive proper maintenance. The sole and exclusive remedy under the Limited Warranty is limited to supply of material in replacement of the sole defective part of material (after examination, verification and approval by Florco). **FLORCO MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, AND ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.** It is agreed that Florco shall not be liable for incidental or consequential damages, including, but not limited to, loss of income, loss of use, damage to other property, the cost of removing and reinstalling Florco flooring materials, attorney's fees, and any liability you may have to any other person.
- You must notify Florco by registered mail, return receipt requested, within 30 days from the accrual of any claim under this Limited Warranty. It is agreed that you have one year from the accrual of a claim to commence any legal action arising from the purchase or use of any Florco product.

- Any suit relating to the interpretation or performance of the Limited Warranty shall be brought in the judicial district encompassing Los Angeles, California.

Florco's Vermont counsel made demand for payment of AmSport on the amount of the Invoice by letter in May 2010. In June 2010 AmSport responded that it was not responsible for paying the Invoice because the Florco products were defective. It is now February 2012 and the full amount of the Invoice remains outstanding.

Florco files suit against AmSport in the U.S. District Court for the District of Vermont seeking payment on the Invoice. AmSport filed a counterclaim seeking damages of \$200,000 for expenses that it incurred in making repairs to defective Florco flooring products included in the Shipment, and for lost sales it incurred during the time it made the repairs.

QUESTIONS

1. Did an enforceable contract exist between the parties? Discuss.
2. Assuming there is an enforceable contract, are the terms on the reverse of the Invoice part of the contract? Discuss.
3. Assuming that the products had manufacturing defects, and that the Limited Warranty is applicable, what is the likely outcome of the Florco suit and the AmSport counterclaim? Discuss.

QUESTION 4 – February 2012

Plaintiff Patricia and Defendant Diane, each now age 28, entered into a civil union in 2004. They have two minor children. In 2007, the couple, together with Diane's mother, purchased a duplex in Burlington for \$300,000. The couple and Diane's mother agreed that the mother would pay half of the purchase price (\$150,000), receive a deeded one-half interest in the property, and live in the ground-floor unit. The couple would pay the remaining half, share a deeded one-half interest in the property, and live on the second floor. At the closing, Diane's mother paid \$150,000, and Patricia and Diane executed a promissory note to cover their share of the purchase price. The present value of the house is \$300,000, and the debt Patricia and Diane owe on their mortgage loan is \$120,000. Patricia owes \$10,000 on a credit card which was used to finance the couple's living expenses during their civil union. Patricia holds a master's degree and earns approximately \$50,000 a year as a teacher. Diane has a high school diploma and an annual salary of roughly \$100,000 as a ballet dancer, a career which usually ends in one's early 30s.

In 2011, the couple separated. Patricia moved out of their residence and rented a nearby apartment. She has filed suit for a civil dissolution from Diane.

Diane has been extremely upset with Patricia since the separation. Diane refuses to speak with Patricia, even about matters affecting their minor children, and has insisted that she and Patricia communicate only by e-mail. Diane refuses to allow the children to bring their belongings to Patricia's household, thus requiring them to have many duplicate possessions. Though both parents have a strong and loving relationship with their children and could provide for their children's needs, Diane's hostility toward Patricia may negatively affect the children, causing them unnecessary stress. Diane typically cooked for the family and bought the children's clothes.

Diane coaches a little league softball team on which one of their children is a player. During one game, Diane was ejected from a game for yelling and cursing at the other team's coach on the field.

Patricia generally cared for the children in the morning while Diane cared for them in the evening. They shared the bedtime rituals as well as the responsibility for bringing the children to appointments. Patricia was arrested and pleaded no contest to marijuana possession in 2011. She claims her actions were the result of stress over the circumstances of the separation, Patricia takes a more sensitive approach to the needs and struggles of the children, whereas Diane has a stricter style that was structured and more consistent. Diane has insisted that she should have sole legal and physical parental rights because she believes she knows what is best for the children, and she has refused Patricia's offer of shared rights.

QUESTIONS

1. How should the Vermont Superior Court Family Division adjudge legal and physical parental rights and parent-child contact between Diane and Patricia? Include a discussion of the controlling factors and the strengths and weaknesses of each party's case.
2. Discuss whether either party is entitled to spousal maintenance and analyze division of the couple's property.
3. Assume that at a hearing prior to final judgment, the Court orally orders that the children are to remain with Diane on weekends and Diane must allow the children to speak on the telephone with Patricia. If Diane refuses Patricia's telephone calls, analyze Patricia's recourse, if any.

QUESTION 5 – February 2012

Legislation passed in 2012 prohibits widgets from being sold in Vermont unless the Commissioner of the Department of Widgets, Thingamabobs, and Stuff ("DWTS") finds that the widgets' manufacturing process is consistent with "the Vermont ethos." The Commissioner's decision must be based upon an initial recommendation from the newly created Widget Advisory Committee ("WAC"). The WAC's recommendation is presumptively binding upon the Commissioner; however, the Commissioner is authorized to reject or modify the recommendation when he or she finds it would not be in the best interests of the state, based on substantial evidence contained in a written record. The legislation authorizes the WAC to hold "hearings," with advance notice by newspaper publication, where the members determine that a request from a party proposing or opposing the sale of widgets raises a "significant issue." The terms "Vermont ethos," "significant issue," and "hearings" are not defined. The statute does not specify a procedure for conducting hearings.

WeMake, a company based in the western United States, manufactures and distributes widgets and other products. WeMake files a request asking for approval to sell widgets in Vermont. Shortly after WeMake's request is filed, the WAC receives a letter from the nonprofit Down With Widgets LLC ("DWW") claiming that WeMake's request would be inconsistent with the

“Vermont ethos.” DWW alleges that WeMake does not offer benefits to workers in its manufacturing plant who are involved in same-sex relationships. DWW further alleges that WeMake’s widgets burst into flames when exposed to temperatures above 85 degrees fahrenheit.

The WAC is comprised of three legislative appointees – Mr. Len (chair), Mr. Mann and Ms. Nunn. Len is a solo practitioner serving as insurance defense counsel for Suresafe, Inc., a company that sells product liability insurance in Vermont. Len has never been involved in regulatory matter before DWTS. Mann is a retired lawyer who used to work with the civil division of the state Attorney General’s office. He remains admitted to practice law in Vermont and his license is active. As an Assistant Attorney General, Mann supervised an investigation into whether WeMake engaged in discriminatory hiring practices. During the investigation, he acquired confidential information surrounding the company’s hiring practices. He did not acquire any information relating to WeMake’s widget manufacturing process. Nunn is a nonlawyer.

During a preliminary teleconference to discuss WeMake’s request, Mann states that he learned from a former colleague that the State may be considering a civil action against WeMake for reasons unrelated to widget manufacturing and sales. Mann recommends obtaining documents from WeMake and grilling their executives at a hearing before he’s willing to consider a recommendation on the widget request. Len expresses a concern to the other members that corporate disclosure materials in WeMake’s request suggest that it may be owned by Suresafe. Nunn is concerned that WeMake and DWW have no common reference point for understanding the meaning of “Vermont ethos,” and wants to provide more guidance to future applicants.

QUESTIONS

1. Is the WAC an “agency” for purposes of the Vermont Administrative Procedures Act (“APA”)? Discuss.
2. Assuming a WAC hearing is a contested case under the APA, explain the procedures available to the WAC to create the evidentiary record sought by Mann.
3. What issues arise under the Vermont Rules of Professional Conduct for Len? Discuss.
4. What issues arise under the Vermont Rules of Professional Conduct for Mann? Discuss.
5. Briefly describe the APA procedure that may be available for the WAC to legally define “Vermont ethos,” including additional information needed to know whether the procedure is available. 4

QUESTION 6 – February 2012

On February 1, 2012, Peter sends the following letter to David:

Dear David, I offer to sell to you my condominium, Unit No. E-12 at Essex Green in Essex Jct. Vermont for \$75,000. I will keep this offer available to you until February 15. Sincerely yours, Peter.

On February 2, Peter meets Betty and tells her about his offer to David. Betty knows that Charlie, to whom Betty owes \$125,000 for an unrelated antecedent debt, would gladly release her from this debt in exchange for Peter's Condominium. Betty orally states as follows:

"Peter, I am sure I could get more than that amount for you from Charlie, therefore, I will pay you \$100,000 for your condominium unit."

In response, Peter says: "You have a deal!" Betty gives Peter \$1,000 deposit in cash on the property and the parties agree to a closing on February 15.

On February 3, David receives Peter's letter and responds immediately as follows:

Dear Peter, Thank you for your letter of February 1, 2012, I accept your offer. Sincerely yours, David.

Peter never receives this February 3 letter from David.

On February 4, Peter writes to David as follows:

Dear David, I hereby revoke my prior offer to you dated February 1, 2012. Sincerely yours, Peter.

David receives this February 4 letter on February 6.

QUESTIONS

1. Does an enforceable contract exist between Peter and David? Discuss.
2. Does an enforceable contract exist between Peter and Betty? Discuss.
3. If no enforceable contract was formed between Peter and Betty, could Betty require Peter to return the \$1,000 deposit she provided to Peter on February 2? Discuss.
4. Could Charlie require Peter to return the \$1,000 deposit to Charlie and not to Betty? Discuss.
5. If Peter mistakenly mails the \$1,000 deposit to David instead of Betty, could Betty require the return of the money from David to her? Discuss.